IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 15-cr-00212 MCA

vs.

JAMAICO TENNISON,

Defendant.

MOTION TO EXCLUDE TESTIMONY OF CHASE FOSTER FROM SUPPRESSION HEARING OR FOR PRODUCTION OF DOCUMENTS UPON WHICH FOSTER RELIED IN FORMING HIS OPINIONS

Mr. Jamaico Tennison, by and through undersigned counsel, respectfully submits the following motion to exclude the testimony of Chase Foster from the suppression hearing scheduled for December 11, 2015. The Court has wide discretion in deciding which evidence it chooses to hear at suppression hearings, and it should decline to hear Foster's testimony because it is duplicative, a waste of time, and essentially irrelevant. If the Court nonetheless decides to hear Foster's testimony, it should require the government to produce the documents upon which Foster relied in forming his opinions prior to the suppression hearing.[1]

BACKGROUND

The goal of the upcoming suppression hearing is to determine whether Mr. Tennison's June 11, 2014 "confession" was obtained in violation of the Constitution. Among other reasons,

[1] Given the nature of this motion, Mr. Tennison presumes it to be opposed by the government. Pursuant to D.N.M.LR-Cr. 47.1, counsel for Mr. Tennison attempted to ascertain the government's position by sending an email to counsel for the government over thirteen hours prior to the filing of this motion. As of the filing of the motion, the government has not yet responded.

Mr. Tennison has moved to suppress his statements on the grounds that the government cannot prove that he provided it voluntarily. (*See* Doc. 50 at 9-10.) In support of this argument, Mr. Tennison argues that FBI Special Agent Jennifer Sullivan employed deception by conducting a faulty polygraph examination and then informing Mr. Tennison that he failed the polygraph "miserably." Mr. Tennison plans to call Dr. Charles Honts to testify that the test was administered improperly, and that the data from Mr. Tennison's polygraph examination do not show that he failed "miserably."

To buttress Sullivan's testimony, the government apparently intends to call another FBI Special Agent, Chase Foster, as a witness. Foster was not involved in any way with the polygraph administered by Sullivan. The government has disclosed to Mr. Tennison certain communications it has had with Foster. Foster has performed his own post-hoc analysis of the polygraph data. As best Mr. Tennison can tell, Foster intends to defend Sullivan's conduct of the polygraph test and to testify that the test was conducted in accordance with various federal standards and protocols. More specifically, he intends to testify that the format of the test was "federally approved," that the scoring system used by Sullivan was "federally approved," that the malfunctioning of the Motion Sensor Device did not invalidate the test, that the pretest interview was appropriate, that the "comparison questions" were proper and "federally approved," that the cuff pressure irregularities did not invalidate the test, and that Sullivan properly interpreted the test results. Despite his apparent reliance on certain standards and policies, the government has not disclosed any of the underlying procedures, protocols, or approvals upon which Foster bases his opinions.

ARGUMENT

I. Foster's Analysis of the Polygraph Would Be Needlessly Cumulative of Sullivan's Testimony, a Waste of Time, and Unduly Prejudicial.

The Federal Rules of Evidence do not apply in their entirety in suppression hearings. Fed. R. Evid. 1101(d)(1). Nonetheless, district courts have a high degree of discretion in determining which witnesses to hear in suppression hearings. *See United States v. Stepp*, 680 F.3d 651, 669 (6th Cir. 2012) (holding that courts have wide discretion in determining whether to hear expert testimony at suppression hearings); *cf. United States v. Bejarano-Ramirez*, 35 Fed. Appx. 740, 746 (10th Cir. 2002) (holding that courts have wide discretion in deciding whether to reopen suppression hearings). Ultimately, a court's ruling on a suppression motion must be supported by "competent, credible evidence." *Stepp*, 680 F.3d at 668 (internal quotation marks omitted). "The Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of…unfair prejudice, confusing the issues…wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. It is within the discretion of the Court to disallow cumulative or repetitive expert testimony. *Marsee v. U.S. Tobacco Co.*, 866 F.2d 319, 324 (10th Cir. 1989). Thus, the Court may "exclude otherwise relevant [expert] evidence when such evidence appears cumulative or otherwise prejudicial." *Swank v. Zimmer*, No. 03-CV-60-B, 2004 WL 5499523 at * 6 (D. Wyo. Jan. 7, 2004).

The government apparently intends to call Foster as a witness to defend Sullivan's conduct of the polygraph test. Sullivan, however, is fully capable of defending her conduct in taking and scoring Mr. Tennison's polygraph examination. Foster and Sullivan have nearly

identical expertise and training,[2] and would be testifying about the same test. Permitting both to testify would be a needless repetitive presentation of cumulative evidence, as well as a waste of this Court's and the parties' time. Moreover, it runs the risk of unfairly prejudicing Mr. Tennison. Litigants should not be permitted to bolster weaknesses in the testimony of their experts by calling additional experts in the same field of expertise simply to provide virtually the same testimony. Were it otherwise, parties could keep calling additional experts ad infinitum in order to buttress their cases.[3] The Court, accordingly, should exercise its broad discretion and decline to allow the government to call two expert witnesses in the same subject area to talk about the same methodological issues.

II. Foster Should Be Required to Disclose the Materials on Which He Has Relied in Forming His Opinions Should the Court Allow Him to Testify.

If the Court does decide to hear Foster's testimony in whole or in part, it should require the government to produce the documents that Foster has relied upon in forming his opinions prior to the suppression hearing. While Rule 702/*Daubert* does not apply with full force in suppression hearings, district courts must still scrutinize expert testimony for reliability using *Daubert*'s principles. *United States v. Banks*, 93 F. Supp. 3d 1237, 1250 (D. Kan. 2015). Those principles include, of course, whether the expert's "testimony is based on sufficient facts or data," whether "the testimony is the product of reliable principles and methods," and whether

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[2] Foster received his polygraph certification in 2004 from the Department of Defense Polygraph Institute at Fort Jackson, South Carolina. (Exhibit A (Foster CV).) Sullivan received her polygraph certification in 2005 from the same institute. (Exhibit B (Transcript excerpt of Sullivan testifying in *United States v. Dyson*, Cr. No.11-cr-01386 MV (Jan. 9, 2014)).)

[3] For example, were Foster allowed to testify, it would only be fair to allow Mr. Tennison to call yet another expert in polygraphy to bolster the testimony of Dr. Honts. Courts should not countenance such redundant evidence.

"the expert has reliably applied he principles and methods to the facts of the case." Fed. R. Evid. 702. In order to make this determination, courts may require experts to disclose the facts and data underlying their opinions prior to cross-examination. *See* Fed. R. Evid. 705.

In order to assess the reliability of Foster's testimony through cross-examination in this case, Mr. Tennison must understand the bases of Foster's analysis. *See, e.g.*, *United States v. Lawson*, 653 F.2d 299 (7th Cir. 1981) ("[A] criminal defendant must . . . have access to the hearsay information relied upon by an expert witness. Without such access, effective cross-examination would be impossible. Rule 705, which provides that an expert need not disclose the facts or data underlying his opinion prior to his testimony unless the court orders otherwise, recognizes this requirement."). Based on the government's disclosures to date, it is clear that Foster relied on the following documents in forming his opinions:

1) Procedures / protocols pertaining to the test formats to be used by FBI polygraph examiners;

2) Procedures / protocols pertaining to FBI polygraph examiners' use and analysis of a Movement Sensor Device;

3) Procedures / protocols pertaining to the scoring system to be used by FBI polygraph examiners and their reliability;

4) Procedures / protocols to be followed by FBI polygraph examiners when conducting a pretest interview;

5) Procedures / protocols pertaining to comparison questions to be used by FBI polygraph examiners, including a list of all "federally-approved" comparison questions; and

6) Procedures / protocols pertaining to FBI polygraph examiners' placement of a pressure cuff and the pressure to be used throughout the test.

Yet the government has provided none of these documents to Mr. Tennison, and they are otherwise unavailable to him.

Thus, if the Court permits Foster to testify, it should require Foster to provide the above-enumerated documents prior to the suppression hearing. Without these documents, Mr. Tennison and the Court are left with no way to assess the reliability or validity of Foster's testimony.[4]

CONCLUSION

WHEREFORE, for the foregoing reasons, the Court should exclude the testimony of Chase Foster from the suppression hearing scheduled for December 11, 2015, or in the alternative, order the disclosure of the documents relied upon by Foster in forming his opinions prior to the suppression hearing.

Respectfully submitted,

/s/ *Todd A. Coberly*
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[4] Moreover, this information is also "material to preparing the defense," and thus discoverable under Fed. R. Crim. P. 16(a)(E)(i).

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2015, I filed the foregoing using the CM/ECF system, which will electronically send notification of such filing to all counsel of record.

/s/ *Todd A. Coberly*
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